No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as co-partners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

TORREGANO & STARK,
Mills Building, San Francisco,
Attorneys for Appellants.

M. C. SYMONDS,
Mills Building, San Francisco,
Of Counsel.

Filed
JUL 27 1
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

[Appellants were heretofore granted leave to file a closing brief not to exceed 35 pages.]

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as co-partners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

Appellee's statement of facts consists mainly of conclusions drawn from the testimony and is incorrect in several respects, most important of which is that appellee seeks therein to answer the questions presented by this appeal. For example, appellee states the asparagus shipped to Rothstein in 1931 was "bunched shipping asparagus", and that "shipping asparagus" and "bunch

asparagus'' are the same thing; that under the agreement at Isleton ''bunched asparagus'' was to be shipped (Brief for Appellee p. 3); that ''bunch grass'' and ''green shipping grass'' as used by the trade are synonymous (App. Br. p. 5); that the number of crates of shipping asparagus produced was 15,161 crates. (App. Br. p. 6.) These statements are not supported by the record, as will be hereafter discussed.

ARGUMENT.

I.

THE STATUTE OF FRAUDS APPLIES TO THE TELEGRAMS. (PLAINTIFF'S EXHIBITS NOS. 2 AND 3.)

Appellee's statement that the statute of frauds does not apply to *growing crops* is incorrect. In *Vulicevich v. Skinner,* 77 Cal. 239 (App. Br. p. 6), the court in making the statement quoted by appellee, was referring to the fact that growing crops were not *real property* within the meaning of the statute of frauds. The quotation from 12 Cal. Jur. page 876 (App. Br. p. 7), relies on *Davis v. McFarlane,* 37 Cal. 636 and *O'Brien v. Ballou,* 116 Cal. 318. These cases hold that growing crops are chattels but are not within the provisions of Section 3440 California Civil Code requiring an immediate delivery and continued change of possession in order for a sale of chattels to be valid as against creditors or purchasers in good faith. That Code Section is not involved herein. California Civil Code Sections 1624 (a) and 1724 (Opening Brief p. 9) requiring contracts for the sale of *goods* of the value of $500

or more to be in writing apply to the alleged contract in the instant proceedings. The word "goods" as used in said Code sections includes *industrial growing crops.* (California Civil Code Section 1796.)

Furthermore, appellee's argument is not applicable in that (1) the alleged contract was for the sale of asparagus to be *shipped* and *was not a sale of growing crops;* and (2) the action is predicated upon a written contract and irrespective of the statute of frauds, the writings relied upon (Plaintiff's Exhibits Nos. 2 and 3), do not constitute a written contract.

II.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) DO NOT CONSTITUTE A SUFFICIENT MEMORANDUM OF THE AGREEMENT OF THE PARTIES TO SATISFY THE REQUIREMENTS OF THE STATUTE OF FRAUDS.

(a) Parol evidence is not admissible to ascertain the identity of the subject matter or the meaning intended by the words used.

Appellee has confused the distinction between introducing parol evidence to explain terms in a contract which are uncertain or ambiguous or to explain the meaning of trade terms and the introduction of parol evidence to ascertain the *intent* with which parties used certain terms. Parol testimony is admissible to show the *ordinary meaning* of the words used and if the words are trade terms to show the meaning of the words in the trade. (California Civil Code, Section 1644; California Code of Civil Procedure, Section 1861.) If the parol testimony disclosed that each of the parties used a different term, parol tes-

timony would not be admissible to show the *intent* with which the parties used their respective terms.

Seymour v. Oelrichs, 156 Cal. 782. (Op. Br. p. 9.)
Wright v. Weeks, 25 N. Y. 153. (Op. Br. p. 27.)

As the undisputed testimony was to the effect that the terms "all asparagus" and "all bunch asparagus" denoted different grades of asparagus (Op. Br. pp. 13-16), it was impossible to ascertain from the writings the *subject matter* of the alleged contract, which is one of the *essential elements* required by the statute of frauds to be contained in the written memorandum. (27 Corpus Juris p. 268.) Furthermore, it does not appear from the face of the telegrams as to what monetary amount would constitute a satisfactory bank guarantee. Therefore, the writings omitted another of the *essential elements* required by the statute of frauds to be in writing, namely, the *terms and conditions* of the alleged contract. (27 Corpus Juris p. 268.)

The citations from 59 A. L. R. page 1423 and 30 A. L. R. page 1167 (App. Br. p. 8), do not support the statement for which they are cited as authority. The courts in said reports held that where an expression relating to price in a contract requires explanation, parol evidence may be admitted so that the court may be in the same position as the parties for the purpose of understanding the agreement. That rule, however, does not mean that if the parties used different prices parol evidence would be admissible to show that they *meant* the same price.

Appellee quotes from *Rohan v. Proctor,* 61 Cal. App. 447 (App. Br. p. 8), for the purpose of showing that parol

evidence is admissible to make terms used certain by showing the prior or contemporaneous understanding of the parties in that regard. The case involved the construction of an agreement to enter into a written lease. An examination thereof discloses that the court first found that the writings contained all of the *essential terms* required by the statute of frauds, and that the parol testimony sought to be introduced was with reference to an uncertainty not required to be in writing, namely, as to the improvements the lessor had agreed to make upon the property prior to the commencement of the lease. The quotation from the case by appellee (App. Br. p. 8) must be read in connection with the facts of the case, the holding of the court being that if the parties had an oral understanding as to the improvements to be made the same could be shown by parol.

Appellee quotes from *Brewer v. Horst & Lachmund,* 127 Cal. 643 (App. Br. p. 9), to show that parol testimony is admissible to connect the *description* used by the parties with the only thing intended. The facts therein disclosed that the parties used the term "Thirteen". The court found by parol evidence that the word "Thirteen" had a particular meaning in the trade, designating a certain picking of hops. The statement therefore by the court relied upon by appellee must be viewed in light of the facts of the case, namely, that the description used by the parties had a definite trade meaning.

The rule quoted in italics by appellee (App. Br. p. 10) is not subject to the interpretation placed thereon by appellee. It is appellee's contention that irrespective of the fact that one party used one term and the other party used

an entirely different term, parol testimony is admissible to show that the parties *intended to use the same term* because of prior relations and dealings had by the parties. In other words, if a party used the word "white" in an offer and the acceptance used the word "black", it is appellee's contention that by parol testimony it could be shown that the parties had only discussed black, and therefore when the word "white" was used in the offer, it meant black and the party accepting knew that the offer meant black, and that was the reason the acceptance used the word "black". If such testimony was admissible, the statute of frauds would become meaningless and a farce. (See *Wright v. Weeks,* 25 N. Y. 153; Op. Br. p. 38.)

Appellee quotes from *Tennant v. Wilde,* 98 Cal. App. 437 (App. Br. p. 10), as authority that parol testimony is admissible to show that the parties understood the language used in the sense contended for. The statement by the court is *preceded* by the following language:

> "If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, *without doing violence to its usual and ordinary import,* or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining." (Italics ours.)

To construe the words "all asparagus" used by appellee in his offer to appellants as meaning "all bunch asparagus" would do violence to the usual and ordinary import of the words used. The same argument would arise if an attempt was made to construe the words "will arrange guaranty" used by appellants as meaning an agreement to arrange a "satisfactory bank guaranty".

The statement that where a written contract is ambiguous or uncertain and where parol evidence as to such facts is disputed, the terms become questions of fact for the jury, has no application herein for the reason that the parol testimony introduced disclosed that the terms used by the parties with reference to the subject matter were not ambiguous or uncertain, but that the terms had different meanings, and also that the term "satisfactory bank guarantee" was too indefinite. Therefore, there was no question of fact for the jury. In the case of *O'Connor v. West Sacramento Co.,* 189 Cal. 7, 18, relied upon by appellee, the court stated:

> "If the facts and circumstances to be considered in the interpretation of the contract are *undisputed,* there is nothing to submit to the jury and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances." (Italics ours.)

The statement by appellee that *Seymour v. Oelrichs,* 156 Cal. 782, lacks point overlooks the rule of the case, namely, that the *intention of the parties cannot be shown by parol.* The case is a leading authority in this state upon that point.

(b) The telegrams (Plaintiff's Exhibits 2 and 3) do not show an absolute and unqualified acceptance by appellants of the offer of appellee.

To show that appellants' telegram (Plaintiff's Exhibit No. 3) was an absolute acceptance of appellee's offer (Plaintiff's Exhibit No. 2) appellee contends that the phrase "all asparagus shipped" as used by appellee in his offer (Plaintiff's Exhibit No. 3) means and *meant to the parties* all shipping asparagus, and that shipping

asparagus and bunch asparagus are one and the same thing. (App. Br. p. 11.) To support this statement appellee contends (1) that shipping asparagus and bunch asparagus are identical terms in the trade; (2) that prior to the sending of the telegrams appellee told appellants that he would ship the same asparagus as shipped through Garin, which was bunch-shipping asparagus; and (3) that as far as appellee knew only bunch asparagus was shipped east. (App. Br. pp. 11, 12.)

The record does not support the statement by appellee. There was not one iota of testimony to the effect that "all asparagus shipped" meant "shipping asparagus" in the trade, and it is apparent from an examination of the phrases that they do not bear the construction placed thereon by appellee. The word "shipping" before the word "asparagus" is descriptive and denotes a particular type of asparagus recognized by the trade as suitable for shipping and can be either *loose pack or bunch pack.* The phrase "all asparagus shipped" on the other hand denoted all of the asparagus that the shipper may see fit to ship. Furthermore, the term "shipping asparagus" and "bunch asparagus" do not have the same meaning. Appellee's own testimony was that "shipping asparagus and bunch asparagus is *practically* the same thing as far as the trade is concerned". (Tr. p. 35.) M. H. Rothstein testified that in the custom and usage of the asparagus trade there is a difference between the terms "bunch asparagus" and "all shipping asparagus". (Tr. p. 86.) There was no testimony to the contrary, and appellee's own testimony disclosed that there is some difference between the terms.

Appellee's statement that as far as he knew no other asparagus was shipped east except "bunch asparagus" is not supported by the record. Appellee's record of his asparagus shipped east (Plaintiff's Exhibit No. 8) discloses that he shipped both bunch and loose asparagus to the east coast. For example, he shipped 220 crates of loose asparagus to Buffalo. (Tr. p. 147.) In other words, *appellee's own records disclose that shipping asparagus can be either bunch pack or loose pack.* This was supported by the testimony of Garin to the effect that there is a loose pack as well as a bunch pack of asparagus, and six grades of bunch pack. (Tr. p. 49.) Therefore, even if conceded that appellee meant "all shipping asparagus" in the offer contained in his telegram (Plaintiff's Exhibit No. 2), appellants only offered to purchase *one particular type of shipping asparagus, namely, the bunch asparagus.* The acceptance was therefore not an unqualified acceptance of plaintiff's offer.

Appellee's statement that Garin testified that green merchantable shipping asparagus would be the same as bunch asparagus omits part of the statement of the witness, namely, that green merchantable shipping asparagus would be the same as bunch asparagus *if it was up to grade.* (Tr. p. 49.)

The testimony of appellee that he told Rothstein prior to the sending of the telegrams that he would ship the same asparagus as shipped through Garin, which was bunch asparagus, is not only incorrect but has no bearing upon the meaning of the terms used by the parties, as the Garin contract (Defendants' Exhibit No. 5, Tr. p. 86) was in no manner referred to in any of the writings and

parol testimony is not admissible to connect writings. (Op. Br. pp. 29, 30.) Furthermore, the Garin contract called for "green merchantable shipping asparagus", and this is not the same as "bunch asparagus". Markham, a witness called by appellants, testified that the Garin contract called for all straight suitable asparagus, without broken tips, suitable for shipping and it was *not* bunch asparagus. (Tr. p. 63.)

Appellee's statement that appellants' assignment of error No. 34 admits that appellee's offer was to sell "all shipping asparagus" is an attempt by appellee to find solace in an inadvertent expression. No other place in the numerous assignments of error does this expression appear.

Appellee's novel contention that the statement in appellants' telegram (Plaintiff's Exhibit No. 3) reading "meanwhile figuring deal confirmed", showed an unqualified acceptance of appellee's offer is worthy of no consideration. In *Izard v. Connecticut Fire Insurance Co.* (Supreme Ct. Ark.), 194 S. W. 1032, the court held in face of the following statement in the writing "Confirmatory of our conversation in Memphis last Friday", etc., that the writing was insufficient within the meaning of the statute of frauds.

Appellee also contends that the phrase "will arrange guarantee" may be reasonably construed as arranging the guarantee demanded, namely, a "satisfactory bank guarantee". (App. Br. p. 13.) Appellee's construction of the two terms does not answer the query, did the appellants make an unqualified acceptance of appellee's offer to sell the asparagus provided a satisfactory bank guar-

antee was given? Where in appellants' telegram did they agree to provide a *bank* guarantee? As a matter of fact, appellants offered a *bond* as a guarantee for faithful performance of the contract. (Tr. p. 33.) The authorities cited by appellee to the effect that uncertainties and ambiguities are to be interpreted most strongly against the one who caused the uncertainty, have no bearing upon the question involved herein in so far as the guarantee is concerned, for the reason that the parties used definite, certain and unambiguous terms. Appellee requested a "satisfactory bank guarantee" and appellants offered to arrange a guarantee without specifying the nature thereof. Furthermore, the term "satisfactory bank guarantee" is too uncertain to be capable of acceptance or to be aided by parol testimony. *Winburgh v. Gay,* 27 Cal. App. 603. (Op. Br. p. 19.)

(c) There was no meeting of the minds of the parties as to the subject matter of the contract.

In reply to the question propounded by appellants asking where in either of the telegrams (Plaintiff's Exhibits 2 and 3) it appears how much in dollars and cents would constitute a "satisfactory bank guarantee", appellee answers that there was an estimate by the parties of 20,000 crates and furthermore that the matter was not one for subsequent settlement or agreement as the agreement to furnish a satisfactory bank guarantee meant one satisfactory to the appellee. (App. Br. p. 14.)

The estimate of 20,000 crates was made *after* the telegrams had been sent. (Tr. pp. 23, 112.) Also, appellee did not demand in his telegram a guarantee satisfactory to him and in no manner could the reply telegram of

appellants be interpreted as consenting to furnish a guarantee satisfactory to appellee as the sole judge as to the reasonableness thereof. In the absence of an understanding that the guarantee is to be satisfactory to one particular party, a stipulation in a contract to perform to the satisfaction of the parties calls merely for such performance as should be satisfactory to a reasonable person. *Scott Co., Inc. v. Rolkin,* 133 Cal. App. 209, 212. All of the authorities cited by appellee deal with situations wherein one party has agreed to perform to the satisfaction of the other party. Furthermore, if appellee be correct in his statement that appellee was to be the sole judge of the reasonableness of the bank guarantee, the failure of appellants to have furnished a bank guarantee satisfactory to appellee would not have given rise to a cause of action by appellee for breach of contract. 13 *Corpus Juris,* page 676.

The fallacy of appellee's entire argument is best illustrated by his statement that the amount of asparagus sold was not open to future agreement, that it was definitely all bunch or shipping asparagus *grown and harvested upon Brannan Island,* for the 1934 green shipping asparagus season which ended April 10, 1934. (App. Br. p. 16.) Nowhere in either telegram do the words "grown" or "Brannan Island" appear, and to construe the offer to *ship* asparagus to mean to sell asparagus *growing on Brannan Island* is neither giving the term used its ordinary meaning or applying thereto a trade term, and such an interpretation of the words used amounts to an attempt to vary the terms of a written instrument. The authorities cited by appellee (App. Br.

pp. 16-17) are subject to the same objection as previously discussed, namely, the authorities deal with situations wherein a description used is uncertain or ambiguous.

Appellee states that neither *Winburgh v. Gay,* 27 Cal. App. 603 (Op. Br. p. 19), nor *Baird Investment Co. v. Harris,* 209 Fed. 291 (Op. Br. p. 21), are in point, as both involve terms and provisions left open to future agreement of the parties. The two telegrams (Plaintiff's Exhibits 2 and 3) also involved terms left open to future agreement of the parties.

The rule of *Baird Investment Co. v. Harris* (supra), to the effect that if any of the terms, no matter how unimportant they may seem, are left open to be settled by future conferences then there is no complete agreement within the Statute of Frauds, is squarely applicable in this proceeding. *The undisputed testimony disclosed that it was necessary for the parties to meet* after the telegrams had been sent in order to determine approximately how much asparagus would be shipped so as to base thereon an estimate as to what amount of guarantee should be furnished. (Tr. pp. 22, 23, 112.) The testimony showed further that after estimating the amount of asparagus to be shipped the parties could not agree upon either the amount nor the type of guarantee to be furnished. (Tr. pp. 23, 113.) Such testimony unequivocably refutes appellee's position that no essentials were left open for future agreement in the case at bar.

Appellee also attempts to distinguish *Hamby v. Truitt,* 81 S. E. 593, upon the ground that the missing element was the weight of the bales referred to in the alleged contract and that no evidence was *introduced* showing

custom or usage as to weight. This analysis by appellee evidences a failure to properly understand the case. The case was decided on demurrer. Plaintiff sought to amend to set forth an oral agreement as to how much the bales sold were to weigh and also the grade of the cotton in the bales. The court refused to permit the amendment and stated that this would have extended the written agreement by the adoption of a parol agreement.

In the instant proceedings appellee distorts the writings (Plaintiff's Exhibits 2 and 3) by contending (1) that "all shipping asparagus" means "bunch asparagus"; (2) that when the offer used the words "all asparagus shipped" the offer meant all "bunch asparagus"; (3) that appellants agreed to provide a "satisfactory bank guarantee"; (4) that appellee was to be the sole judge as to the reasonableness of the guarantee; (5) that the satisfactory bank guarantee was to cover a shipment of approximately 20,000 crates of bunch or shipping asparagus; and (6) that appellants agreed to purchase all bunch or shipping asparagus grown or harvested on Brannan Island.

All of the above contentions by appellee incorrectly interpret the writings; do not give to the words used either their ordinary meaning or trade definition, and completely vary the terms of the writings.

The crux of the entire question regarding the parol testimony introduced in evidence as to the *intent* with which the parties used and understood the terms in their respective telegrams, objected to by appellants and exception noted (Tr. pp. 25-30), is evidenced by appellee's statement that parol testimony is admissible to show the *meaning intended* by the parties to words used in writ-

ings which are *uncertain.* (App. Br. p. 19.) As heretofore shown, the terms "all asparagus shipped" and "all bunch asparagus" had definite trade meanings each term denoting a *different* grade of asparagus. The terms were not *uncertain.* Parol testimony was not admissible to show that when plaintiff used the term "all asparagus shipped", he meant "all bunch asparagus".

> "If the parties have used abbreviations or technical terms, or *terms of trade,* evidence may be given, by parol, to show what meaning such abbreviations and terms had acquired, by usage or custom, *but not in what sense the parties used them.*" (Italics ours.)
> *Wright v. Weeks,* 25 N. Y. 153, 160.

The case of *American Sugar Refining Co. v. Colvin,* 286 Fed. 685, cited by appellee (App. Br. p. 19), dealt solely with the right to introduce parol testimony to show the *meaning of technical words used.*

Furthermore, as heretofore shown, it was impossible to ascertain from the face of the telegrams what monetary amount would constitute a "satisfactory bank guarantee"; that it was necessary for the parties to meet *after* the telegrams were sent in order to estimate the amount of asparagus to be shipped and thereby estimate the amount of guarantee that should be provided. The term "satisfactory bank guarantee" therefore could not be understood without recourse to parol evidence to show the intention of the parties. In *Seymour v. Oelrichs,* 156 Cal. 782, 787, the court stated:

> "To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such degree of certainty that it may be understood *without recourse to parol evidence to show*

the intention of the parties'. (5 Browne on Statute of Frauds, Sec. 371.)'' (Italics ours.)

Furthermore, appellants did not agree to provide a *bank* guarantee. (Plaintiff's Exhibit No. 3.) At the meeting held after the transmission of the telegrams, appellants offered to post a *bond.*

(d) The telegrams were not mutually binding upon the parties.

In response to the question propounded by appellants as to how much asparagus appellee was bound to *ship,* appellee replies that he was bound to ship all the shipping or bunch asparagus *grown on Brannan Island.* Appellants now ask, where in either telegram do the words ''grown'' or ''Brannan Island'' appear? Appellee attempts to distinguish the case of *Hazelhurst v. Mercantile etc. Co.,* 166 Fed. 191 (Op. Br. p. 32), by stating that the defendant therein agreed to purchase all ties plaintiff could produce and *ship,* which is quite different than selling a *growing* crop of produce, the amount of which can be reduced to a certainty. (App. Br. p. 21.) Appellee again distorts the words used in appellee's telegram, namely, to sell all asparagus *shipped,* by stating that the alleged contract was to sell all asparagus *grown.*

Appellee continues to assume the erroneous position that where there is a prior oral understanding it may be resorted to so as to identify the subject matter referred to in the written memorandum. The authorities cited by appellee do not support this statement. In *Brewer v. Horst & Lachmund,* 127 Cal. 643, parol testimony was introduced to explain a trade term. In *Diffendrof v.*

Pilcher, 116 Cal. App. 27, the court stated the general rule that in the construction of executory contracts of sale of *real property* the courts have been most liberal to give effect to the intention of the parties as to descriptions. *Preble v. Abrahams,* 88 Cal. 245, also involved the sale of *real property.* In *Rohan v. Proctor,* 61 Cal. App. 447, the parol testimony was not with reference to an essential term required under the statute to be in writing.

Appellee refers to the last cited case as showing that the court indicated that in the absence of a prior oral understanding, the memorandum would have come within the bar of the Statute of Frauds. The statement of the court must be read in light of the facts. The court first found that it was not necessary for an agreement to enter into a lease to fix the time of the commencement of the lease; that it was only necessary to fix the term of the lease; that if the agreement called for repairs, parol testimony would be admissible to show what the agreement of the parties was with reference to the repairs to be done, and that as a matter of law the lease would be deemed to commence from the time of the completion of the repairs. If, however, there was no understanding as to the repairs to be done, it was impossible to fix a time for the lease to commence, and therefore the written agreement would be obnoxious to the State of Frauds. In other words, unless there was a parol understanding as to the repairs to be done, which was not required under the Statute of Frauds to be in writing, the court could not determine when the lease was to run and therefore the memorandum would not be sufficient to constitute a contract.

The correct rule in this regard is stated in *Lewis v. Elliott Bay Logging Co.* (Supreme Court of Washington), 191 Pac. 803, as follows:

> "* * * We have not overlooked the rule that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown for the purpose of applying the contract to the subject-matter, *but this rule does not go to the extent of permitting an essential term of the memorandum to be shown by oral testimony.*" (Italics ours.)

III.

APPELLANTS ARE NOT ESTOPPED TO DENY THAT THE TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) CONSTITUTED A BINDING CONTRACT.

The statement by appellee that appellants' telegram was an absolute and unqualified acceptance of the offer contained in appellee's telegram assumes to answer one of the questions presented by this appeal, namely, whether or not the two telegrams constituted a written contract. The statement in appellants' telegram referring to the confirming of the deal is of no importance. See *Izard v. Connecticut Fire Insurance Co.*, supra. Appellants also stated in their telegram "draw up contract my arrival" thereby offsetting the reference to the confirming of the deal and showing that no contract had in fact been entered into.

IV.

A VARIANCE EXISTS BETWEEN THE PROOF AND THE PLEADINGS AND THE ISSUE RAISED HAS BEEN SAVED FOR REVIEW BY THIS COURT.

Objection was made to the introduction in evidence of the telegram from appellants (Plaintiff's Exhibit No. 3) upon the ground that it did not conform to the allegations set forth in the complaint, and an exception was taken to the overruling of the objection. (Tr. pp. 20-21.) An assignment of error was based upon the fact that the evidence did not disclose a contract as alleged in appellee's complaint. (Assignment of Error No. 4, Tr. p. 213.)

It is well recognized that state practice is followed in the federal courts in matters of variance and conformity of proof to allegations in the complaint.

Longsdorf Cyc. of Fed. Proc., Vol. 2, p. 599.

The California law regarding the urging of variance between the pleadings and proof differs from the law of the State of Illinois, relied upon by the case of *Illinois Car etc. Co. v. Linstroth,* 112 Fed. 737, cited by appellee. In *Thompson v. M. K. & T. Oil Co.,* 5 Cal. App. (2d) 117, 121, the court stated:

> "It is well settled that if a defendant desires to take advantage of a variance, it must be done either by objecting to the admission of the testimony or by motion for a non-suit, * * *"

In *California S. F. Corporation v. J. D. Millar Realty Co.,* 118 Cal. App. 185, 190, the court stated:

> "Moreover, the objection to the introduction of the note in evidence was placed upon the sole ground that 'there is no proof of delivery'. The objection

> was not made upon the ground of variance between the allegation of transfer and the proof thereof, *nor even upon the ground of incompetency.* The note was properly admitted in evidence.'' (Italics ours.)

As heretofore stated, objection was made by appellants to the introduction of appellants' telegrams (Plaintiff's Exhibit No. 3) upon the ground that it did not conform to the allegations in the complaint. (Tr. pp. 20-21.) In this regard, the court's attention is respectfully called to the various questions asked by the trial judge at the time of the making of the objection, and the replies given thereto by counsel for appellants. (Tr. p. 20.) At the conclusion of the trial, appellants moved to strike certain testimony given upon the ground that there was a *variance* between the pleadings and the proof. (Tr. p. 173.) Also, a motion for a directed verdict was made upon the ground that the evidence was insufficient to show a contract in writing as alleged in appellee's complaint. (Tr. p. 173.)

It is respectfully submitted that appellants sufficiently urged the variance between the pleadings and the proof to apprise appellee of the discrepancy. The statement by appellee that if a variance did exist it was immaterial and would not prejudice the appellants is not well taken for the reason, as stated by appellants (Op. Br. p. 35), if the complaint had used the word ''shipped'' instead of the word ''grown'', the complaint would have failed to state a cause of action, furthermore for the same reason appellee could not have amended his complaint during the course of the trial to conform with the evidence. The variance was therefore material and prejudicial to ap-

pellants. Even if the variance could have been cured by amendment, it is still fatal to the validity of the judgment. *Fernandez v. Western Fuse etc.,* 34 Cal. App. 420, 422.

V.

APPELLANTS' MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

As there was no conflict in the testimony with reference to the telegrams (Plaintiff's Exhibits 2 and 3), there was no issue of fact for the jury, and therefore appellants' motion for a directed verdict should have been granted.

The parol testimony as to the grade of asparagus referred to in the two telegrams unequivocably showed that each of the parties referred to a different grade of asparagus. The terms used were not ambiguous or uncertain, and in the usage of the trade each term had a definite meaning. The parol testimony introduced as to the meaning of the words "satisfactory bank guarantee" showed that it was impossible to arrange such a guarantee without the parties first agreeing as to the approximate amount of asparagus to be shipped. Nowhere on the face of the telegrams was the amount of asparagus to be shipped indicated. The evidence showed that no discussion as to the amount of the guarantee was had by the parties until *after* the telegrams were sent. (Tr. pp. 23, 112.) The term "satisfactory bank guarantee" was also too uncertain to form a basis for a meeting of the minds. *Winburgh v. Gay,* 26 Cal. App. 603. Furthermore, appellants did not agree to provide a "satisfactory bank

guarantee'' but merely agreed to arrange a ''guarantee''. (Plaintiff's Exhibit No. 3.) The evidence showed that a guarantee in connection with the produce trade could be arranged by other means than a bank guarantee. (Tr. pp. 46, 47.) The telegrams (Plaintiff's Exhibits No. 2 and 3) also disclosed a variance between the pleadings (Tr. p. 3) and the proof.

The case of *O'Connor v. West Sacramento Co.,* 189 Cal. 7, 18, from which appellee quotes, must be read in light of the sentence which prefaced the quotation, which reads as follows:

> ''We will not undertake to analyze these cases, for the reason that the fundamental principle involved is elementary, and is recognized in these decisions, namely, *that the construction of a contract is always a matter of law for the court,* no matter how ambiguous or uncertain or difficult its terms and that the jury can only assist the court by determining disputed questions of fact.'' (Italics ours.)

The court also stated:

> ''But in no case can the proper construction of the contract be left to a jury.''

There being no disputed questions of fact involved, it was incumbent upon the court to grant the motion for a directed verdict.

VI.

THE DAMAGES AWARDED APPELLEE BY THE JURY WERE NOT SUFFICIENTLY PROVED BY THE EVIDENCE.

Before commencing the discussion of the question of damages, it is necessary to point out that the appellee

throughout his brief has referred to Plaintiff's Exhibit No. 8 as his "sales account". This should not be confused with the "account sales" ordinarily rendered to shippers by consignees of produce. Plaintiff's Exhibit No. 8 was a pencil memorandum prepared by appellee from the account sales rendered to him. It contained a summary of some of the items set forth in the account sales. The summary, however, omitted many material items contained in the account sales as will be hereinafter discussed.

Appellants' assignment of error relating to the introduction in evidence of Plaintiff's Exhibit No. 8 (Assignment of Error No. 8, Tr. p. 214; No. 37, Tr. p. 226; No. 14, Tr. p. 215), and Assignment of Error No. 15 (Tr. p. 216) relating to Plaintiff's Exhibit No. 9 do not violate Rules 11 and 24 of this court. Appellants' brief complies in detail with the requirements of Rule 24 which pertains to the form and contents of brief. Appellants' assignments of error were filed prior to the amendment of Rule 11 on February 1, 1937. However, the grounds of error set forth in said assignments were urged in the trial court as objection to the introduction of said exhibits in evidence and exceptions noted. (Tr. pp. 141, 161, 154, 167.)

(a) Appellee's memoranda of sales (Plaintiffs' Exhibit No. 8) were not sufficient proof of the amounts received by appellee from the sale or disposition of the asparagus and did not constitute a permanent record of original entry.

Objection was made to the sufficiency of the evidence that the railroad claims did not exceed $100.00. This was on the ground that there was no foundation laid, there being no showing as to the volume of business done

in the particular year referred to upon which appellee based his computation. (Tr. p. 166.)

Appellants did not proceed upon the theory that appellee's memoranda of sales (Plaintiff's Exhibit No. 8) did not reflect the entire amount received from the *sales* of asparagus. (App. Br. p. 29.) At the trial, after appellee had testified that the memoranda (Plaintiff's Exhibit No. 8) did not show the entire money received from the sale, *disposition* or consignment of the asparagus, appellants moved to strike the exhibit from the record upon the ground that it was incomplete. (Tr. p. 161.) Objection was also made to the introduction in evidence of Plaintiff's Exhibit No. 8 upon the ground that it was hearsay, incompetent, irrelevant, not the best evidence, and was not a book of permanent record. (Tr. p. 141.)

The measure of damages for the alleged breach of a contract in the State of California is fixed by Section 1784 of the Civil Code as being the difference between the contract price and the market or current price at the time when the goods ought to have been accepted. The memoranda (Plaintiff's Exhibit No. 8) merely showed the alleged *net* amount received by appellee after the agents had deducted freight, commissions, and sometimes cartage and precooling. Said Plaintiff's Exhibit No. 8 did not show the price for which the asparagus was sold, from which appellants could have ascertained whether the price received was the *market or current price*. In this connection, appellee alleged in his complaint that the market or current price for the goods at the time when the defendants should have accepted the same was the sum of $22,547.85. However, the evidence discloses that

said sum represented an alleged *net* amount received by appellee and not the market price for which the asparagus was sold. (Tr. pp. 155, 156.) Therefore, appellee's statement that it was not necessary that the memoranda of sales (Plaintiff's Exhibit No. 8) should set forth the *gross* sales price or the specified grade of asparagus sold is incorrect.

Appellee states that at the trial appellants did not contend that the *net amount* claimed to have been received by appellee from the sale of the asparagus was not the correct net. (App. Br. p. 29.) This statement ignores the position taken by appellants during the entire trial that the *net* amount received by appellee was not the proper basis upon which to fix damages; that appellee must first show the price for which the asparagus was *sold on the open market,* and that after showing the market price appellee could then deduct therefrom the various charges properly incurred by him in connection therewith, and thus predicate his damages upon the net received. Appellee chose, however, to merely introduce evidence by Plaintiff's Exhibit No. 8 that he had sold 15,161 crates of bunch asparagus, and that he had received therefor the net sum of $22,547.85. When confronted with the fact that certain refunds had been received on claims against railroads which were not ascertainable from Plaintiff's Exhibit No. 8, appellee sought to cover this omission by testifying over the objection and exception of appellants that the railroad claims had never in previous years exceeded $100.00. (Tr. p. 166.)

The authorities cited by appellee (App. Br. pp. 30, 31) do not support his contention that Plaintiff's Exhibit No.

8 was a book of *original entry*. *Landis v. Turner,* 14 Cal. 573 (App. Br. p. 30), is direct authority in support of appellants' position. In that case the plaintiff testified that the charges were first entered on a slate and then transferred to the book which he sought to introduce in evidence. The court stated that the entries on the slate were mere memoranda and not intended to be permanent. In the case at bar Plaintiff's Exhibit No. 8, consisting of pencil entries made by appellee from the account sales rendered by the agents in the east, which pencil entries were thereafter turned over to appellee's bookkeeper to enable him to make ink entries in a permanent book not produced in court, constituted mere memoranda.

Appellee's statement that in *Idol v. S. F. Construction Co.,* 1 Cal. App. 92, the court held that entries from way-bills were original entries, is incorrect. The plaintiff therein testified that until September 17th he entered in the book upon which he relied to prove the number of men hauled, the names of the men sent out each day, but that after that date he *copied the names in the book from the way-bills,* that *up to* September 17th he was absolutely certain that the book contained a correct statement of the name of every man hauled and that *after* that date the book contained a correct account of every man on the way-bills. The court stated at page 94:

> "The book was the book of original entry *up to* September 17th, the entries made therein by the plaintiff at the time of the transaction, and was properly introduced in evidence for the purpose of showing the number of men sent out to that date. *But after September 17th the waybills constituted the 'original entry', and they are not the book to which their contents were transcribed.*" (Italics ours.)

The cases of *Storm & Butts v. Lipscomb,* 117 Cal. App. 6, and *Patrick v. Tetzlaff,* 46 Cal. App. 243, are not in point as in the instant case appellee testified that after making the pencilled memoranda of sales (Plaintiff's Exhibit No. 8), he turned the memoranda over to his bookkeeper to enter the cash received in ink in a cash book and that the cash book correctly showed all moneys received from the disposition of the asparagus. (Tr. pp. 136-139.) Appellee admitted that Plaintiff's Exhibit No. 8 did not show all the money received from the sale, disposition or consignment of the asparagus. (Tr. p. 161.) The cash book *not* produced in court was appellee's permanent record of moneys received. Furthermore, appellee still had in his possession the *original* account sales received from the various agents which he did not produce. (Tr. pp. 137-138.)

In *Patrick v. Tetzlaff,* supra, time cards of various workmen were introduced in evidence after the bookkeeper had identified the signatures of the workmen. It is apparent that the court was correct in permitting the introduction of the time cards. The court stated that it would be impossible in a large plant to have all of the workmen testify. The case presents a different situation than shown by the instant proceedings. *The account sales of the various agents in the east are analogous to time cards.* The account sales, according to the testimony of appellee, showed what the asparagus was sold for and also showed the various charges deducted by the agents from the gross amount received from the sale of the asparagus. These account sales under the authorities cited by appellee could have been introduced in evidence as

original records. Furthermore, if Plaintiff's Exhibit No. 8 had been an exact copy of the account sales showing the price for which the asparagus was sold on the market and the amounts of the various charges deducted therefrom, it may have been admissible under Section 1947 of the *Code of Civil Procedure,* cited by appellee, as being a copy of an entry repeated in the regular course of business. However, Plaintiff's Exhibit No. 8 failed to disclose the most important fact shown on the account sales of the various agents, a fact which appellee under the law of the State of California and by his pleadings was bound to prove, namely, the market price for which the asparagus was sold. Plaintiff's Exhibit No. 8 was therefore not a sufficient copy of the account sales.

In *Storm & Butts v. Lipscomb,* supra, relied upon by appellee, the time sheets were prepared from memoranda prepared by the foreman who had turned the memoranda over to the timekeeper, who made the entries on the time sheets. *The memoranda were not preserved.* The time sheets were such as were ordinarily kept by construction companies. The court held the time sheets admissible in evidence. The distinction between the case cited and the case at bar is that Plaintiff's Exhibit No. 8 *does not purport* to be a copy of the account sales, and as already stated, does not show the most important elements, namely, the amount for which the asparagus was sold on the open market and the amount and nature of the various charges to be deducted therefrom. Furthermore, the account sales of the various agents were still in the possession of appellee. What is more, Plaintiff's Exhibit No. 8 did not even purport to be a permanent record of all moneys

received by appellee. The best evidence of this fact is the cash book kept in ink by appellee's bookkeeper and not produced in court.

Appellee contends that the ledger introduced in evidence in *Sugarloaf etc. v. Skewes,* 47 Cal. App. 470, cannot be differentiated from the memoranda of sales. (Plaintiff's Exhibit No. 8, App. Br. p. 33.) Appellee overlooks the fact that *in the Sugarloaf case the sales accounts rendered by the agents were introduced in evidence along with the ledger,* that objection had been made to the introduction of that part of the ledger referring to the account sales, and the court held that if there was any error in the reception of the ledger account as covering the items of the account sales, the error was cured by the introduction of the account sales themselves. The case cited supports the position taken by appellants at the time of the trial and on this appeal, that Plaintiff's Exhibit No. 8 was not admissible in evidence as proof of damages suffered in the absence of the original account sales, particularly in view of the fact that said exhibit did not even purport to be an exact copy of the account sales, omitted the most important portions thereof, and the original account sales were still in the possession of appellee.

Appellee's statement that he checked the *gross* sales prices of the asparagus shown in his agents' sales reports against the daily report of asparagus sales shown in the "Federal Market News Service" (Plaintiff's Exhibit No. 9), and found the prices his agents secured were in line with those shown by the market service, was not only appellee's conclusion, to which objection and exception was taken (Tr. pp. 151, 152), but shows the further sound-

ness of appellants' position that without the *original sales accounts,* appellee failed to prove his damages. If the original sales accounts had been produced showing the *gross* sales prices, they could have been compared with the *gross* sales prices shown in the Federal Market Service (Plaintiff's Exhibit No. 9) and by comparing the said prices, it could have been ascertained readily whether or not appellee's asparagus had been sold for the market or current price. There was no manner by which the said market news service reports (Plaintiff's Exhibit No. 9) could be compared with Plaintiff's Exhibit No. 8.

(b) Appellee's memoranda of sales (Plaintiff's Exhibit No. 8) were not admissible in evidence as proof of its contents as an itemized summary by express statutory permission.

Plaintiff's Exhibit No. 8 was not properly introduced in evidence under Section 1855 of the Code of Civil Procedure of the State of California as being a summary of the account sales, which could not have been examined in court without great loss of time, for the reason that in the summary appellee omitted to show the *gross* sales price which was the most important item shown on the account sales rendered by the agents, and furthermore it failed to show the various charges deducted from the gross sales price received.

Appellee infers that appellants should have made a demand for the original account sales. This is manifestly not correct. The burden of proving damages was upon the appellee, the plaintiff below. Appellants objected to the introduction of Plaintiff's Exhibit No. 8 upon the numerous grounds heretofore set forth and this placed appellee upon notice that the original account sales must be produced in court.

The case of *Campbell v. Rice,* 22 Cal. App. 734, 736 (Op. Br. p. 57), is of significant importance by way of reply to appellee. The court stated:

> "Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, *for it conclusively appears that the document was transcribed from order sheets, payrolls, and other data constituting a book of original entry * * * in the possession of plaintiff and which he might have produced, thus giving defendant and the court an opportunity to examine it, in order to determine its integrity and correctness* and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence. *We are referred to no authority, and we know of none, holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence,* while, on the contrary, numerous authorities hold such ruling to be error." (Italics ours.)

(c) There was no competent evidence in the record showing the grade and market price of the asparagus sold by appellee's agents.

As heretofore stated by appellants (Op. Br. p. 60), assuming that both Plaintiff's Exhibits Nos. 8 and 9 were properly admitted in evidence, appellee failed to prove his alleged damages in that the exhibits could not be compared or reconciled to determine whether appellee's asparagus was sold for the market or current price, in that the Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the *gross* prices for which different grades of bunch asparagus were sold on various eastern markets. The memoranda of sales (Plaintiff's Exhibit No.

8) on the other hand, did not disclose either the grade of bunch asparagus shipped by appellee or the *gross amount* received therefor on the market. Appellee therefore failed to sustain the allegation in his complaint that the market or current price for the asparagus, at the time when the same ought to have been accepted by appellants, was $22,547.85. Appellee's testimony disclosed that the sum was the amount received by him from sales after the deduction of certain charges which were not shown. It did not represent the market price. Appellee even concedes that the said amount did not represent his entire receipts, he having omitted to give credit for the amount of the refunds actually received by him from railroad claims. (Tr. p. 161.) Appellee was unable to testify as to the amount of such refunds. (Tr. p. 164.)

There was absolutely no testimony whatsoever from which the court, the jury, or any other person, could have determined whether the appellee's asparagus was sold for the market or current price. Without this proof appellee could not sustain his damages in accordance with the law of the State of California. Section 1784, *Civil Code.*

CONCLUSION.

It is respectfully submitted that by reason of the fact that the two telegrams relied upon by appellee did not constitute a contract, and for the further reason that appellee failed to sustain his burden of proving damages, the judgment of the United States District Court for the Northern District of California should be reversed, and a judgment

ordered entered in favor of the appellants, the defendants below.

Dated, San Francisco,
July 30, 1937.

Respectfully submitted,
TORREGANO & STARK,
By ERNEST J. TORREGANO,
Attorneys for Appellants.

M. C. SYMONDS,
Of Counsel.